

lit.

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

ENSLOW ROOFING, INC.)	
)	
Appellant,)	PCHB No. 91-181
)	
v.)	
)	
PUGET SOUND AIR POLLUTION CONTROL)	FINAL FINDINGS OF FACT,
AGENCY,)	CONCLUSIONS OF LAW
)	AND ORDER
Respondent.)	

A formal hearing of an appeal to review a one thousand dollar (\$1,000) civil penalty assessed by the Puget Sound Air Pollution Control Agency (PSAPCA) upon appellant Enslow Roofing, Inc. (Enslow) was held by the Pollution Control Hearings Board on February 12, 1992, at Lacey, WA. In attendance were Board members Chairman Harold S. Zimmerman and Annette McGee with John H. Buckwalter, Administrative Law Judge, presiding.

Appellant Enslow was represented by Kenneth F. Enslow, pro se, and respondent PSAPCA by Attorney Keith D. McGoffin of McGoffin and McGoffin. The proceedings were recorded by Louise M. Becker, Court Reporter, of Gene Barker & Associates, Olympia, WA.

Opening statements were made, witnesses were sworn and testified, exhibits were admitted and examined, and closing arguments were heard. From the testimony, exhibits, and arguments, the Board makes these

1 FINDINGS OF FACT

2 I

3 On May 9, 1991, Lieutenant Carroll L. Britt, Tacoma, WA, Fire
4 Department Inspector, responded to a call concerning an alleged
5 illegal burn. At approximately 1330 hours, he arrived at the scene at
6 the Enslow stock yard, 3460 So. 66th St., Tacoma, WA. where he
7 examined the remains of a fire which had already been extinguished by
8 Engine No. 17. In the residue, which was approximately 4' by 6' in
9 size, Lieutenant Britt observed what he described as burned
10 pressboard, shingles, and other wood products. Lieutenant Britt then
11 met with Mr. Kenneth Enslow who, according to Lieutenant Britt's
12 testimony, indicated that he was the owner of the Enslow firm. Mr.
13 Enslow testified that he indicated to Lieutenant Britt that he was the
14 manager, not the owner. Lieutenant Britt informed Mr. Enslow that the
15 burning was illegal because a permit was needed and nothing other than
16 natural vegetation could be burned in the City of Tacoma. Lieutenant
17 Britt then issued a violation notice to Mr. Enslow, charging him with
18 "Burning without a permit and burning other than natural vegetation
19 (press board, shingles, and other wood products)" in violation of Code
20 No. 3.02.040(8) and assessing a penalty of \$120. This penalty was
21 paid by Mr. Enslow.

22 II

23 On May 14, 1991, PSAPCA (hereinafter the "Agency") received a
24

1 Fire Communications Report from the Tacoma Fire Department notifying
2 the Agency of the May 9 fire at the Enslow yard. Air Pollution
3 Inspector Larry C. Vaughn obtained relevant documentation and
4 photographs from Lieutenant Britt.

5 III

6 The Agency issued a Notice of Violation, No. 27474, dated May 23,
7 1991 to Mr. Enslow which described the May 9th fire as being in
8 violation of "PSAPCA Regulation I, sections 8.02(a)(2), causing or
9 allowing an outdoor fire other than natural vegetation, and
10 8.02(a)(4), causing or allowing an outdoor fire other than land
11 clearing burning or residential burning - burning press board,
12 shingles and lumber". This Notice was accompanied by an Agency letter
13 addressed to Mr. Enslow requesting his written statement of what
14 corrective action he would take to prevent further violations. The
15 letter also informed Mr. Enslow that violations may be subject to a
16 civil penalty assessment of \$1,000 per violation per day. Mr. Enslow
17 responded by letter to the Agency, dated May 28, 1991:

18
19 *I Ken Enslow have instructed all office personnel*
20 *and employees to not allow burning of any kind. We*
21 *have allocated one dump truck to stay in the yard at*
22 *all time to dispose of waste and be taken to the*
23 *dump. This Co. will obey all regulations of your*
24 *agency. If any questions, please call.*

25 (Signature by Ken F. Enslow)

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2 IV

3 The Agency sent Mr. Enslow a NOTICE AND ORDER OF CIVIL PENALTY,
4 dated July, 24, 1991 which charged him with violation of Sections
5 8.02(a)(2) and 8.02(a)(4) summarized as "Caused or allowed an unlawful
6 outdoor fire containing press board, shingles, and lumber; and which
7 was not land clearing or residential burning at 3640 South 66th Street
8 in Tacoma, Washington." The NOTICE also imposed a fine of \$1000. The
9 present appeal, signed by Ken F. Enslow, was filed with the Board.

10 V

11 Any Conclusion of Law hereinafter recited which is deemed to be
12 Finding of Fact is hereby adopted as such.

13 VI

14 From these Findings of Fact, the Board makes these

15 CONCLUSIONS OF LAW

16 I

17 The Board has jurisdiction over these parties and this appeal.
18 Chapters 70.94 and 43.21B RCW. Because this is an appeal of a civil
19 penalty, the Agency has the burden of proof.

20 II

21 Puget Sound Air Pollution Control Agency REGULATION I, SECTION
22 8.02 PROHIBITED OUTDOOR FIRES provides that:

23 (a) *It shall be unlawful for any person to cause or*
24 *allow any outdoor fire:*

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(4)

27

- (1) (or)
(2) Containing garbage, dead animals, asphalt,
petroleum products, paints, rubber products,
plastics or any substance other than natural
vegetation which normally emits dense smoke or
obnoxious odors, or
(3) (or)
(4) Other than land clearing burning or
residential burning.

III

No evidence was presented by the Agency that any of the substances named under (2) above were in the residue of the fire except, possibly, tar shingles. Lieutenant Britt testified that there was such tar shingle residue, while Mr. Enslow testified that there was not. Photographs presented by the Agency as Exhibits R-10 and R-11 were inconclusive.

Since neither Lieutenant Britt, Mr. Vaughn, nor any other Agency witness was present when the fire was burning, no conclusive evidence was presented that the materials burned in the fire did or normally do emit dense smoke or obnoxious odors.

The Agency having failed in its burden of proof, the Board cannot and does not conclude that Endsloviolated the provisions of subparagraph (2) of 8.02(a).

IV

The testimony of both Lieutenant Britt and Mr. Ensloviolated the provisions of subparagraph (2) of 8.02(a). The Board

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(5)

1 concludes that the fire was in violation of subparagraph (4) of
2 8.02(a).

3 V

4 Since the subparagraphs of 8.02(a) are stated in the alternative,
5 a violation of either (2) or (4) constitutes a violation of Section
6 8.02, PROHIBITED OUTDOOR FIRES, subject to civil penalty.

7 We conclude that the civil penalty of \$1,000 was properly imposed
8 by the Agency.

9 VI

10 During the hearing, Mr. Enslow asserted at various times that he
11 is not the owner of Enslow Brothers, Inc. In addition to Lieutenant
12 Britt's testimony that Mr. Enslow stated, at the fire location, that
13 he (Mr. Enslow) was the owner, the record shows Mr. Enslow
14 consistently acted alone for Enslow Roofing, Inc.: the violation
15 ticket, Exhibit R-2, issued by Lieutenant Britt has Mr. Enslow's
16 signature as the Defendant; the sworn statement of Lieutenant Britt,
17 Exhibit R-3, identifies Mr. Enslow as the owner; testimony of Mr.
18 Enslow was that he paid the \$120 civil fine imposed by the violation
19 ticket; the Agency's Notice of Violation 27474, Exhibit R-4, was
20 addressed to Kenneth F Enslow-Owner; Enslow's statement of corrective
21 action, Exhibit R-6, was signed by Ken F. Enslow; the Agency's Notice
22 and Order of Civil Penalty, Exhibit R-7, was addressed to Kenneth and
23 Arlene Enslow dba Enslow Roofing, Inc.; Endslow's request to the Board
24

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1 for a continuance, dated Feb. 3, 1992, was signed by Ken Enslow; and
2 Enslow's subsequent Motion for Continuance of Hearing, submitted by
3 and with the affidavit of F.G.Enslow, Attorney for Petitioner, makes
4 no such denial of Kenneth F. Enslow's ownership.

5 VII

6 Although the entire process from the date of the fire on May 91,
7 1991 until the hearing on February 12, 1992, was over a nine months
8 period, and despite Mr. Enslow's full participation and action on
9 behalf of Enslow Roofing, Inc. during that time, it was not until the
10 hearing that Mr. Enslow raised the issue of ownership of Enslow
11 Roofing Inc.

12 From the documents on record on which Mr. Enslow accepted
13 designation of himself as owner without protest, the Board concludes
14 that Kenneth F. Enslow is the owner or co-owner of Enslow Roofing, Inc.

15 Section 8.02(a), states that "It shall be unlawful for any person
16 to cause or allow any outdoor fire:...." (emphasis added.) At the
17 hearing, Mr. Enslow testified that Enslow Roofing Inc. does not
18 ordinarily burn materials in its yard, but that on May 9, 1991, he
19 advised the person (unidentified) who started the fire to do so.

20 The Board concludes that, even if Mr. Enslow were not the owner
21 of the business, he did, in fact, "cause or allow" the fire to be
22 built and was in violation of 8.02(a)(2).

The Board makes no finding or conclusion, nor is it required to, as to whether the penalty should be paid by Kenneth F. Enslow as an individual or by Enslow Roofing Inc.

IX

Enslow requests mitigation of the penalty.

The Agency's Exhibit R-9, composed of multiple relevant documents, shows that the Agency served a Notice and Order of Civil Penalty No. 7110, dated January 23, 1990, on Ken and Arlene Enslow dba Enslow Roofing for a violation of the Agency's Regulation I in that they "caused or allowed an outdoor fire containing prohibited materials for the purpose of reclamation of materials during an air pollution episode." The Notice imposed a \$1,000 fine, and Enslow filed an appeal with this Board (PCHB No. 90-22). Before hearing, the parties settled the matter by "payment of \$250 and no unexcused violations for 2 years", and the case was dismissed by order of the Board on April 25, 1990.

x

Kenneth F. Enslow has again violated Section 8.02(a) of Regulation I in just slightly over a one year period. He not only has failed to meet the two year period imposed by the settlement of April 25, 1990, but was instrumental in the illegal fire of May 9, 1992. The Board concludes that the \$1,000 penalty will not be mitigated.

1 XI

2 Any Finding of Fact which is deemed a Conclusion of Law is hereby
3 adopted as such.

4 XII

5 From these Conclusions of Law the Board enters the following
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ORDER

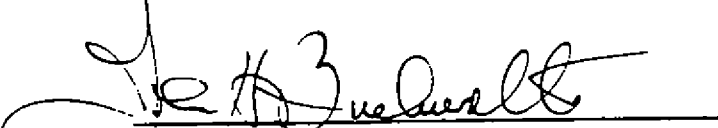
Puget Sound Air Pollution Control Agency Notice and Order of
Civil Penalty No. 7452 and the civil fine of \$1,000 are AFFIRMED.

Done this 28th day of February, 1992

POLLUTION CONTROL HEARINGS BOARD


HAROLD S. ZIMMERMAN, Chairman


ANNETTE S. MCGEE, Member


JOHN H. BUCKWALTER
Administrative Law Judge